

THE L. B. X.

(District Court, W. D. Missouri, C. D. March 29, 1899.)

1. MARITIME LIENS—VESSEL IN ESSE—REPAIRS.

Where, after a vessel had been launched and navigated, it was discovered that her engine was inadequate, and it became necessary to supplant it with another, the contract to furnish such new engine is a maritime contract for the repair of a vessel in esse, and hence creates a maritime lien on such vessel for the price of the engine, under Rev. St. Mo. § 770, providing that all boats shall be subject to a lien for repairs, and admiralty rule 12, permitting suits in rem by material men for supplies or repairs, etc., against the ship.

2. SAME—REPAIRS TO BE COMPLETED ON LAND.

Where a new engine was specially manufactured at libelant's factory for a vessel then in port, to which it was shipped on completion, and it was agreed that the libelant should retain title in the engine until it had been set up, and found to work satisfactorily, the delivery was not complete until after the engine had been placed and operated on the vessel, and hence was not a contract for repairs to be completed on land, so as to prevent the attachment of a maritime lien therefor.

3. SAME—WAIVER.

The owner of a vessel, on contracting for repairs, agreed to pay cash on delivery, but thereafter, being unable to do so, agreed that libelant should have a lien on the repairs and vessel for the same. After the repairs had been delivered, the owner refused to give notes in form agreed, and thereupon libelant objected to the note offered, and offered to return it, and waive security on the vessel, if the owner would divide the payments as requested, to which no reply was made. *Held* not to constitute a waiver of libelant's maritime lien on the vessel.

4. SAME—BURDEN OF PROOF.

Since a maritime lien for repairs attaches to the vessel by operation of law, the burden is on the one claiming a waiver thereof to show affirmatively that the lien was waived as part of the contract.

5. SAME—NOTES TAKEN IN PAYMENT.

The mere giving of notes in payment of repairs on a vessel does not of itself create a waiver of the contractor's maritime lien therefor. The notes not being paid, he may return them, and enforce his lien.

6. SAME—EQUITABLE MORTGAGE.

The lien was not lost by the acceptance of a note containing a provision rendering it an equitable chattel mortgage.

Wash Adams and Charles B. Adams, for libelant.

S. D. Chamberlin and Edward L. King, for claimant.

PHILIPS, District Judge. This is an action in admiralty for the enforcement of a maritime lien on the defendant stern-wheel boat, navigating the Missouri river in this district, for an alleged repairing of said boat by libelant with a 38 horse power gasoline engine, with necessary fixtures and appurtenances for operating same on said boat. One Henry Strutman, who claims to be the master and owner of said boat, interposed as claimant. The answer admits the furnishing of the engine and appurtenances by the libelant, but claims (1) that the engine, etc., was not for furnishings made, or repairs, for said boat, but the same was for the equipment of a vessel, either not yet completed, or, if completed, was simply a substitute for another engine on the vessel, and the new engine was not, therefore, a necessary repair within the purview of a maritime lien; and (2) that by special contract or

agreement between the contracting parties a maritime lien was waived. The court referred the matter to John Montgomery, Jr., Esq., as commissioner, to take the evidence, and report the same, with his findings and conclusions, to the court. His report having been filed herein, finding the issues for the libelant, the claimant has filed exceptions thereto, which have been heard, and submitted to the court. The commissioner has found the fact to be that this steamboat had been engaged for some months prior to the negotiations between the parties for the engine in question in navigating the Missouri river; that it was first equipped with an engine which proved to be inadequate and insufficient to accomplish the work in which the vessel was engaged; and, therefore, it was necessary, in the opinion of the master and owner of the vessel, that the engine in use should be entirely removed, and one of libelant's manufacture should be substituted therefor. The contention that, to constitute a repair within the meaning of the law, it must be for some alteration, improvement upon, or rearrangement of an existing structure on the vessel, is not supported either by reason or established authority. This vessel having theretofore been launched, and actually engaged in navigation, the material furnished was not for the original construction of the vessel; in other words, it was not furnished under a contract to create a new boat.

"But whatever is done to or about an existing ship has a direct reference to commerce and navigation. A ship in esse as a maritime subject gives a maritime character to all transactions connected directly with it. The cases are distinguishable thus: One class founded upon contracts for repairing and rebuilding of vessels, all such contracts to be maritime, because they affect vessels in esse; the other class, founded upon contracts for the building of proposed vessels, hold such contracts to be nonmaritime, because they touch maritime subjects only by relation to proposed vessels, the future existence of which is contingent upon the performance of the terms of the contract in each case." *The Manhattan*, 46 Fed. 797.

As said in *The Eliza Ladd*, 3 Sawy. 519, 523, Fed. Cas. No. 4,364:

"A contract, made after a vessel is launched and afloat, to furnish her with a particular means of propulsion,—as sails or steam paddles,—or to change the mode of her propulsion, is a maritime contract. Certainly it is not a contract to be performed on land. Neither is it a contract to build, any more than any contract for repairs."

A water pump furnished to a water craft used for pumping out a dry dock has been held to be for maritime service, for which a lien in admiralty may be enforced. *Winslow v. A. Floating Steam Pump*, 2 N. J. Law J. 124, Fed. Cas. No. 17,880. Likewise casts furnished for a foreign vessel are materials for which a lien obtains. *Zane v. The President*, 4 Wash. 454, Fed. Cas. No. 18,201. It is suggested in argument, but not specifically pleaded, that no maritime lien obtains in this case for the further reason that the repairs in question, if any, were made on land, and not on the vessel. The facts are, as found by the commissioner, that the steamboat was in port at Jefferson City; and the libelant had its factory at Kansas City, Mo., where the engine and appurtenances were manufactured under contract especially for this vessel. When completed it was to be shipped f. o. b. to the claim-

ant at Jefferson City, to be placed by him on the vessel at that port. But this is not all. By reason of claimant's failure to comply with the terms of his contract with libelant in paying for the engine when ready to be placed upon the vessel, upon his further insistence it was further agreed between them that the engine should be put in place upon the vessel, the libelant retaining temporary title thereto until the claimant could test the engine in the operation of the vessel; and, if it proved satisfactory, it was to be finally received and paid for by him. And it was accordingly so placed upon the vessel, and tested to the satisfaction of the claimant. Therefore, from claimant's standpoint of view, the delivery was not completed until the engine was finally put in place and operated for some time upon the vessel. Under such circumstances it would be to allow the claimant to take advantage of his own default and wrong, after thus insisting upon making a test in the actual working of the engine on his vessel, to hold that this was a contract to be wholly completed on land. Nor, under such circumstances, can it in law or morals affect the material man's lien that the contract contemplated that the master of the vessel should receive and place the engine in position on the vessel, as this arrangement pertained rather to the matter of the cost of repair than to the right to a maritime lien. The statute of this state (Rev. St. § 770) expressly declares that "every boat or vessel, etc., used in navigating the waters of this state shall be liable and subject to a lien in the following cases: In the building, repairing, etc., thereof." The twelfth admiralty rule provides that "in all suits by material men for supplies or repairs or other necessaries, the libelant may proceed against the ship, etc., in rem, or against the master or owner alone in personam." When this is viewed in connection with the rule as originally adopted in 1844, it shows the purpose to give the material man a lien for all supplies or repairs, with or without the existence of a local law giving such lien.

2. The persistent contention of claimant to avoid the enforcement of a lien upon his vessel for this essential equipment of the vessel after it entered upon navigation, to enable it to accomplish its required propulsion, is as reprehensible in morals as it is unfounded in fact and law. A brief reference to the negotiations between these parties leading up to the obtaining possession of the engine and its equipments can leave no doubt in any fair and unprejudiced mind that this claimant deceitfully and cunningly intended from the outset to obtain possession of this engine without paying for it. The negotiations began in the fall of 1896, by correspondence between the claimant and libelant. In his letters the claimant stated that his boat had been upon the river for some time, and the engine in use thereon was insufficient, and he wished to obtain one of the libelant's manufacture. The price first demanded by libelant for the engine and appurtenances was \$1,200. This demand was not acceded to by the claimant. Later, during the winter of 1896-97, the claimant visited Kansas City, when, by verbal negotiations between them, the kind and quality of engine desired by claimant was agreed upon; and,

in consideration of a cash payment to be made therefor on the delivery of the engine and material at Jefferson City, f. o. b., the libelant agreed to take \$900, and the claimant assented thereto. He stated, both in his correspondence and in his conversation with the libelant, that he could secure the payment of the contract price by giving certain of his relatives as sureties, and, finally, that through their assistance he could obtain the whole of the purchase money therefor; and the minds of the parties met upon the proposition that the libelant would proceed with the manufacture of the engine, with its appurtenances, and that the claimant would deposit the \$900 with the Merchants' Bank of Jefferson City, Mo., to be paid over to the libelant upon the delivery of the engine, etc. After this the claimant, by letter, objected to some part of the equipment to be furnished by libelant, and insisted upon the substitution of something else, which the libelant claimed would materially add to the expense of construction; but this change was ultimately conceded by the libelant, to end the controversy. About the time the construction of the engine and equipments were completed and the claimant was notified of its readiness for delivery, the claimant wrote to libelant to delay delivery for a few days on account of ice in the river obstructing navigation, and because he wanted "a couple of days on the money now out," but requesting him to ship the "pulley and clutch," which was part of the machinery, and also the pump. With this request libelant complied, replying that the engine was ready for shipment, and it would ship just as soon as it received from said bank a letter advising it of the money being on deposit, as agreed upon. Nothing more was heard from the claimant until about a week thereafter,—February 17, 1897,—when he wrote that his son-in-law had failed to sell property as expected, and he had failed to obtain the money; and then began to talk about giving security for the money. To this libelant replied, expressing surprise at the news of the failure to have the money ready, and asked the claimant how much time he wanted, and how much cash he could pay down; and inquired, if his father and the security he spoke of were good, why he did not obtain the money from the banks. After waiting a week without hearing from the claimant, the libelant wrote him again, saying that it had not heard from him, and that the engine was ready and waiting. After the lapse of another week the claimant wrote: "I ain't got the money yet. Let us go partners in the boat;" and, further, that he would be able in two or three months "to buy you out again"; that there was no money to be had at local banks. He again adverted in this letter to his father and his son-in-law, stating that he was greatly needing the engine, and that he was losing business by not being able to get started with his boat, and offering to pay if he got the money; and as evidence of the fact of the absolute necessity of this engine to his boat he used this language: "I know you are disappointed, but not as bad as I am. You can sell your engine, but I can't sell my boat without an engine." After another delay he wrote that he had \$400 which he could pay; but not to send the engine until he saw the custom officers, to know what changes he would have to make in the registry of his boat. After some correspondence respecting this mat-

ter, and further delay, he wrote that he had only \$300, and offering to give his note with 6 per cent. interest, and the "engine for security"; and that he would pay as fast as he got the money. To properly appreciate and understand this proposition to give the engine for security, it is well to revert to the fact found by the commissioner, and sustained by the weight of the evidence, that in the interviews between the parties at Kansas City in the winter preceding it was then understood between them that for any deferred payments of the purchase money the libelant was to have a lien upon both the engine and the boat. To the last-named letter from claimant the libelant replied, noting the offer to pay \$300, and for time, etc., reminding him that the contract was strictly for cash, and therefore the price was low, but was willing to try and help him out in the matter, and asked him by return mail to say how much time he wanted on the balance, suggesting that if he could make it in 2, 3, 4, 5, and 6 months, divided up to suit himself, it would be satisfactory; "but if we sell on time we ask that you remit us draft for first payment. As soon as this is received we will ship engine; and when it is set up and running on your boat you are to make us the notes, making payments inside of six months, and with 8 per cent. interest instead of 6, as we are obliged to pay eight per cent. here for our money." This letter was dated March 18, 1897. Instead of meeting this proposition, the claimant seems to have called to his assistance a lawyer, who wrote for him on the 19th of March, stating that he (Strutman) "desires me to say—and I know the fact to be—that he has \$300.00 in bank for you. He is willing to pay you this money when the engine in satisfactory condition is delivered f. o. b. to him here. He will give you time notes, as you suggest, at eight per cent. for the balance of the \$600.00." Libelant telegraphed on the 20th: "Will ship as per letter of 18th. Answer promptly." On this day claimant telegraphed the libelant: "You money ready here if engine satisfactory. If it will not work, consider deal off." Thus it is made manifest that the claimant did not accede unconditionally to even the last proposition made him by the libelant to settle this matter; but began to impose other conditions, such as that the engine must be satisfactory, and if "it will not work, consider deal off." After this, on the 22d, he telegraphed libelant: "Send as per my attorney's letter; money ready." The engine was shipped to Jefferson City, and the bill of lading was sent to said bank with the notes to be executed by the claimant, bearing date of March 24, 1897, with a lien reserved therein on the boat. Instead of claimant complying with the modified arrangement, his attorney wrote on the 27th of March, stating that the bill of lading for the engine had been received by the bank, and "that you demand the \$300.00 and \$600.00 in notes before he (Strutman) gets the engine, or has a chance to examine and try it. His agreement was to pay \$300.00 down upon delivery; * * * and he would give you the notes as soon as he had a chance to try the engine,—it proving satisfactory." The letter then further naively suggested that the engine, under the law, was subject to be taken for the purchase money; and further suggesting that a bill of sale could

be given by Strutman for the engine before making the notes, to be released on making the notes. So, again, did the claimant fail to comply with the terms of his own proposition by declining to give the notes, or any notes at all, and imposing the additional condition that he was to take the engine and test it on the boat before either paying the money or giving the notes.

As by claimant's repeated receding from proposition after proposition, and cunning jugglery, he had gotten the engine delivered at Jefferson City, so that the libelant was much at his mercy, the libelant wrote said lawyer on the 29th of March, consenting that on the payment of the \$300 down, and giving the bank the bill of sale for the engine, conditioned upon the release when the notes were signed, Strutman could take the engine, set it up on the boat, and test it, "and within two weeks sign the notes for the balance." The \$300 was afterwards paid, but the notes were not given in any form at that time. Strutman and his lawyer afterwards, on the 27th day of April, 1897, induced said bank to take from Strutman a single note for the balance of the purchase money, \$565.03, payable to libelant October 27, 1897, the consideration of which was expressed to be for one No. 9 Weber gasoline engine, with appurtenances, sold and conveyed by Strutman to libelant, with a condition something after the character of a chattel mortgage, to be discharged upon the payment of said sum of money. There is no pretense of authority from libelant to said bank to take such a note. The agent of the bank who had this matter in charge for libelant testified that it was not the note authorized to be taken, and when it was forwarded to the libelant it immediately, on April 29, 1897, returned the same to the bank, and wrote Mr. Strutman, advising him of its return, and stating that it was not in accordance with the agreement in any respect; that he was to pay the balance on the engine within six months after the engine was shipped, and therefore the notes should bear interest from the 24th of March; and further reminding the claimant of his agreement to give security by a lien on both the engine and the boat, and requesting him to go to the bank and give a note of date March 24, 1897, covering both the engine and the boat. This the claimant failed and refused to do; and again, on the 5th of May, 1897, libelant wrote the claimant, complaining of his refusal, and reminding him of his promise during the negotiations to give a mortgage on the engine and the boat. The answer to this from Strutman came on May the 18th, in which, without at all denying the statement in the letter to him about his promises, he simply said that he was working "to make money with the intention to pay for the engine to keep from paying eight per cent." To this claimant replied on the 22d of May, 1897, upbraiding him for not keeping his promises, and advising him that libelant had written to the bank that, if the claimant did not want to give the boat as security, if he would divide up the payments, one-third in two months, one-third in four months, and one-third in six months, it would waive the security on the boat. To this claimant made no reply, nor did he go to the bank and make the notes accordingly;

but on the 25th of June he wrote the libelant without saying a word about the settlement of the contract, but only in commendation of the efficiency of the engine, and promising to pay "a nice chunk of money on or immediately after pay day, July 5th." No payment was made, however, until August 2d following, of \$102. From all of which it is apparent that the libelant never consented to waive his maritime lien except upon conditions with which the claimant never complied; and therefore the implied lien which the law gives remained in force. *Rubber Co. v. Ohrndorf*, 29 C. C. A. 188, 85 Fed. 348-353.

Counsel for claimant presents his case as if it devolved upon the libelant to show a specific agreement between the parties that a lien upon the boat should be retained. The law gave the lien absolutely; and, therefore, it devolved upon the claimant to show affirmatively that this lien was waived as a part of the contract. No unprejudiced mind can read the correspondence and the testimony of the parties without being persuaded that it never was the intention of the libelant to waive his right to security upon the boat except upon the condition either of a cash payment, which was originally agreed upon, or the giving of personal security; or, finally, when driven to it by the bad faith and sharp practice of the claimant in getting the engine delivered at Jefferson City, and his refusal to do anything except upon his own terms, libelant proposed to waive the security on the boat if the claimant would make certain notes, which he never made, and if he would make certain payments, which he never made. Had the claimant paid the \$300 and given notes for the balance, that of itself would not have amounted to a waiver of the lien. "The notes being unpaid, he may return them, and enforce his lien." *The Kimball*, 3 Wall, 37. This is precisely what the libelant did with the note of April 27, 1897, delivered to the bank by claimant; the return of which is again offered at this trial. Even if the note of April 27, 1897, were construed as an equitable chattel mortgage, and even if it had been accepted by the libelant, as the mortgage is but an incident of the note, that of itself was not sufficient to waive the maritime lien. *The D. B. Steelman*, 48 Fed. 580. And what adds conclusiveness against the contention of claimant is the fact that the letter of his counsel, suggesting the matter of the bill of sale of the engine, conveyed the idea that this was only a temporary arrangement for the protection of the libelant while the engine was being tested on the boat, to end when the test was satisfactory. And even then he did not give such bill of sale on taking the engine and putting it up, but a month later, allowing himself six months from the 27th day of April, 1897, in which to pay, instead of six months from the date of delivery of the engine, to which libelant refused to accede. The result of all of these maneuvers of the claimant is that for two years he has had the use of the engine, without paying therefor, during which he has, by his meritless litigation, piled up costs equal to the original debt. He, with a show of virtue, offers to allow judgment in personam for the balance due on the contract; but this loses its flavor of fairness in the

fact that he knows such judgment would bear no fruit for his creditor. The exceptions to the commissioner's report are overruled, and decree ordered for the libelant.

THE ANACES.

(Circuit Court of Appeals, Fourth Circuit. March 30, 1899.)

No. 280.

1. MARITIME LIENS FOR TORTS—AMERICAN DOCTRINE.

It is the settled rule in the United States that there is a maritime lien for the injury inflicted by a maritime tort, with but few exceptions, such as that made by admiralty rule 16 in the case of suits for assault and beating.

2. SAME—PERSONAL INJURIES—NEGLIGENCE OF SHIP OFFICERS.

Under the maritime law, as administered in the United States, a stevedore, injured while in the employ of a master stevedore engaged in loading a ship, through the negligent operation of a steam winch belonging to the ship, and under the management of its officers, may maintain a libel in rem against the ship therefor.

3. ADMIRALTY PLEADING—SUFFICIENCY OF LIBEL.

While the burden rests upon a libelant—alleging, in a suit against a ship, that he was injured through the inexperience and incompetence of a man who was operating a steam winch, to which duty he was assigned by the master—to prove that the master failed to exercise proper care and diligence to ascertain the qualifications of the man for the work, or failed to remove him after his incompetency was known to some officer of the ship, an allegation in the libel that the master relieved a competent man from the work, and put in his place an ordinary laborer, who was unacquainted with the operation of the winch, and who was not even connected with the ship, is a sufficient allegation of negligence on the part of the master, where the libel was not excepted to, and was met by an allegation in the answer that the man was competent.

Appeal from the District Court of the United States for the Eastern District of North Carolina.

This is a libel in rem in admiralty instituted by McCollum, the appellant, against the British steamship *Anaces* to recover damages for injuries received by the libelant while working, as a stevedore, stowing cotton in the hold of the steamship. The case stated by the libelant is that, while he was at work in the hold, several bales of cotton were suddenly dropped upon him; that he was one of a number of stevedores employed by a master stevedore who had a contract to load the ship; that it was the custom of the port, and one of the terms of the contract for the stevedoring, that the steamship should furnish and operate the winch for hoisting and lowering the cotton, and should provide a man of skill and experience to operate it, so as not to endanger the stevedores working in the hold; that the injury to the libelant was caused by the negligence and incompetency of the man employed by the ship's officers to operate the winch; that the man employed by the master of the ship to operate the winch was an ordinary laborer, entirely inexperienced and unskilled, who was intrusted with a duty requiring experienced judgment in order to avoid injuring the stevedores working in the hold, and that the master in employing an incompetent man, without experience, to operate the winch, was guilty of negligence, and failed in a duty which the owners of the ship owed the libelant; that the injury was caused by the incompetency of the winchman, and through no fault of the libelant. The steamship was arrested, and released upon stipulation. The master appeared as claimant, and filed an answer controverting the allegations of the libel; denying that the winchman was incompetent; alleging that he was a highly-skilled man,

selected by the head stevedore, and that the libelant was injured through his own recklessness in not heeding warnings given him. When the case was called for trial it appears that the respondent made a motion orally to dismiss the libel because improperly brought as a libel in rem. This defense was not made in the answer, and should properly have been made before answer, by exception (Ben. Adm. §§ 466, 468); but the court heard the motion, and dismissed the libel, as stated in the decree, "for the reason that a libel in rem for the causes set forth in the libel will not lie in this court." 87 Fed. 565. From this decree the libelant has appealed.

Iredell Meares (Bellamy & Son, on the brief), for appellant.
George Rountree, for appellee.

Before GOFF, Circuit Judge, and MORRIS and WADDILL, District Judges.

MORRIS, District Judge (after stating the facts as above). The district judge held that the only remedy in admiralty for a personal injury to one lawfully upon the ship, resulting from the negligent failure of the officers of the ship to perform a duty necessary for his safety, is by libel in personam, and that a libel in rem cannot be maintained.

Admiralty rule 23 provides that:

"All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of tort or damage, or of salvage, or of possession or otherwise, as the case may be; and, if the libel be in rem, that the property is within the district; and, if in personam, the names and occupations and places of residence of the parties."

The only action for tort which by express rule is forbidden to be brought in rem is that mentioned in rule 16, which declares that all suits for assaults and beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, shall be in personam only. It is admitted that the libel charges a maritime tort, and that the admiralty has jurisdiction (*Leathers v. Blessing*, 105 U. S. 626), and that many maritime torts give a maritime lien, with a right to proceed in rem to recover the damage sustained; but endeavor has been made to show that maritime torts of the particular kind alleged in this libel do not have that privilege. It is admitted that negligence in navigation, resulting in a collision causing injuries to persons, gives a lien, and that suits for injuries to passengers caused by negligence of the ship's officers can be enforced in rem. And it is hardly denied that personal injuries resulting from defective appliances, or want of proper construction of the ship, give a lien; but it is argued that personal injuries which are caused by negligent misuse of a proper appliance do not give a lien, although they do give an action in admiralty against the owners of the ship. This is an attempt to make a distinction which does not find countenance in the reported decisions of admiralty courts of the United States. In *The A. Heaton*, 43 Fed. 592, Mr. Justice Gray, sitting in the circuit court, hearing an appeal from the district court of Massachusetts, in a very careful and learned opinion, said:

"In England, indeed, it appears unsettled whether a libel in rem can be maintained in admiralty for a personal injury. But on principle, as observed by a recent English writer, it would seem difficult to deny the justice of the

view that personal injuries inflicted by a ship might confer a maritime lien, or formulate a satisfactory reason why damages occasioned to a man's property should give rise to rights of a higher nature, or be the subject of a more effective remedy, than an injury occasioned under the same circumstances to his person. 4 Law Quar. Rev. 388. In this country it has been established by a series of judgments of the supreme court of the United States that a libel in admiralty may be maintained against the ship for any personal injury for which the owners are liable under the general law, independently of any local statute. Accordingly, passengers have often maintained libels, as well against the ship carrying them as against other ships, for personal injuries caused by negligence for which the owners were responsible. *The New World*, 16 How. 469; *The Washington*, 9 Wall. 513; *The Juniata*, 93 U. S. 337; *The City of Panama*, 101 U. S. 453, 462. The sixteenth admiralty rule, which directs that 'in all suits for an assault or beating upon the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only,' does not affect libels for negligence."

In *The John G. Stevens*, 170 U. S. 114, 120, 121, 18 Sup. Ct. 544, Mr. Justice Gray, speaking for the supreme court, said:

"The foundation of the rule that collision gives to the party injured a jus in re in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. The principle, as has been observed by careful text writers on both sides of the Atlantic, has been more clearly established and more fully carried out in this country than in England. Henry, Adm. Jur. & Proc. § 75; Mars. Mar. Coll. (3d Ed.) 93."

And he cites the following passage from *The Malek Adhel*, 2 How. 210, 234:

"The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a willful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas, or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself used as the means of the mischief, as the best and surest pledge for the compensation to the injured party."

He cites also the following from *The China*, 7 Wall. 58, 68:

"The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel, or by abandoning it to the creditors. But, while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors."

The case of *The John G. Stevens* is also an authority against the suggestion, made in argument, that the fact that there was no contract in the present case between the libellant and the vessel was a reason for holding that he had no maritime lien for his injuries. On page 124, 170 U. S., and page 549, 18 Sup. Ct., it is said:

"It was argued that the liability of a tug for the loss of her tow was analogous to the liability of a common carrier for the loss of the goods carried. But even an action by a passenger, or by an owner of goods, against a carrier, for neglect to carry and deliver in safety, is an action for breach of a duty imposed by the law, independently of contract or of consideration, and it is therefore founded in tort. *Railroad Co. v. Derby*, 14 How. 468, 485; *Railroad Co. v. Laird*, 164 U. S. 393, 17 Sup. Ct. 120. In *Norwich Co. v. Wright*, 13

Wall. 104, 122, Mr. Justice Bradley, referring to *Macl. Shipp.* (1st Ed.) 598, laid down these general propositions: 'Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc. But they stand on an equality with regard to each other, if they arise from the same cause.' * * * This court more than once has directly affirmed that a suit by the owner of a tow against her tug, to recover for an injury to the tow by negligence on the part of the tug, is a suit *ex delicto*, and not *ex contractu*. In *The Quickstep*, 9 Wall. 665, 670, a libel by the owner of a tow against her tug set forth a contract with the tug, for a stipulated price, to tow directly, and a deviation and an unreasonable delay in its performance, and that the tug negligently backed into the tow and injured her. An objection that the libel could not be maintained because the contract alleged was not proven was overruled by this court. Mr. Justice Davis, in delivering judgment, said: "The libel was not filed to recover damages for the breach of a contract, as is contended, but to obtain compensation for the commission of a tort. It is true, it asserts a contract of towage; but this is done by way of inducement to the real grievance complained of, which is the wrong suffered by the libelant in the destruction of his boat by the carelessness and mismanagement of the captain of the *Quickstep*."

It would appear, therefore, to be the settled rule in the United States that there is a maritime lien for the injury inflicted by maritime torts, with but few exceptions,—for instance, that made by rule 16, that suits for assault and beating shall be in *personam* only. In our Reports are many such actions in *rem* in the district and appellate courts in which the maritime lien has not been questioned, and many of them are suits by stevedores and others not having direct contractual relations with the ship. *The Rheola*, 19 Fed. 926. This was a libel in *rem* by a stevedore, one of a number employed by a master stevedore to discharge the ship, who was injured by the breaking of a defective chain furnished by the ship. On appeal to the circuit court, Judge Wallace said:

"As the libelant was not directly employed by the master, and could only look to the master stevedore for his pay, there was no privity of contract between him and the shipowners. Nor did the relation of master and servant, in its technical sense, exist between the libelant and the shipowner. But it is conceived that this does not in the least affect the obligation of the master not to be negligent towards the libelant, or the degree of care which it was incumbent upon him to exercise. The libelant was performing a service in which the shipowners had an interest, and which they contemplated would be performed by the use of the appliances which they agreed to provide. They were under the same obligation to him not to expose him to unnecessary danger that they were to the master stevedore, his employer. This was no express obligation on their part, to either, to provide safe and suitable appliances; but they were under an implied duty to each, and the measure of duty towards each was the same."

Steel v. McNeil, 60 Fed. 105, in the circuit court of appeals for the Fifth circuit, was a libel in *rem* by one of a number of stevedores, not in the immediate pay of the ship, who was injured by a block which had been negligently rigged with an insufficient shackle bolt by the ship's crew. The libel was maintained.

The Panama, 101 U. S. 453-462, was an action in *rem* by a passenger who fell into a hatchway negligently left open by some of the crew of the ship. The court said:

"Injuries of the kind alleged give the party a claim for compensation, and the cause of action may be prosecuted by a libel in *rem* against the ship; and the rule is universal that, if the libel is sustained, the decree may be enforced

in rem, as in other cases where a maritime lien arises. These principles are so well known, and so universally acknowledged, that argument in their support is unnecessary."

The *Elton*, 83 Fed. 519, was a case heard in this court on appeal from the district of South Carolina. The libel was in rem for injuries to a stevedore resulting from unsafe appliances furnished by the ship, and the decree against the ship was affirmed.

Among other cases, the following may be cited in which libels in rem have been maintained for personal injuries,—many of them by stevedores and others not directly employed by the ship: *The Kate Cann*, 2 Fed. 241, 8 Fed. 719; *The Lord Derby*, 17 Fed. 265; *The Helios*, 12 Fed. 732; *The Calista Hawes*, 14 Fed. 493; *The Max Morris*, 24 Fed. 860, affirmed in 137 U. S. 1, 11 Sup. Ct. 29; *The Guillermo*, 26 Fed. 921; *The Daylesford*, 30 Fed. 633; *The Carolina*, Id. 199; *Crawford v. The Wells City*, 38 Fed. 47; *The Protos*, 48 Fed. 919; *The Nebo*, 40 Fed. 31; *The Frank and Willie*, 45 Fed. 495; *The William Branfoot*, 48 Fed. 914, affirmed in this court, 3 C. C. A. 155, 52 Fed. 390; *The Manhanset*, 53 Fed. 843; *The France*, Id.; *The Para*, 56 Fed. 241; *The Joseph B. Thomas*, 86 Fed. 658; *The Saratoga*, 87 Fed. 349.

Every consideration of justice and of convenience urges that the maritime lien, if it exists, should be maintained in cases like the present one. The owners of the vessel almost invariably are unknown and inaccessible. To require the libellant to serve process on them is practically to deny him any remedy. Under the statutes of the United States, the owners of all the vessel property, foreign and domestic, are given, to the fullest extent, the privilege of limiting their liability to the value of their interest in the vessel. The injured party cannot touch their property, outside of their interest in the ship, if they claim to limit their liability; and there are strong reasons of justice and convenience why he should have a maritime lien upon that specific property, and why distinctions, not founded in reason, between claims of the same general merit, should not gain a place in a system of jurisprudence which is intended to approach natural justice.

It is urged for the appellee that the case of *Currie v. McKnight* [1897] App. Cas. 97, in the house of lords, is a persuasive decision, of high authority, to establish the contention that there is no maritime lien in the present case. In *Currie v. McKnight* the master of the vessel against which the maritime lien was asserted had, in order to release her from a position of peril, wrongfully cut the moorings of another ship, and caused her to drift ashore and receive damage. By the judgment of the house of lords it was declared to be the admiralty law, as established in England since the case of *The Bold Buccleugh*, 7 Moore, P. C. 267, that when a ship is carelessly navigated, so as to occasion injury to another vessel, the injured vessel has a remedy against the corpus of the offending ship, and that this right arises from the fact that the offending ship is the instrument which causes the damage, and it was stated that in the case in hand it appeared from the findings of fact that the damage was not caused by any movement of the vessel proceeded against, in the course of her navigation, but was occasioned by the act of her crew in removing an obstacle to her

starting on her voyage. As the result of the judgments delivered in the case, the ruling was that, under the English law, to render a ship liable to a maritime lien the ship itself must be the instrument which causes the damage. Whether the reasoning of the judgments delivered in *Currie v. McKnight* would be held satisfactory in our courts, which have made, not solely the fact that the ship is the direct instrument which causes the damage the test of a maritime lien, but also the fact that the maritime tort has resulted from the negligent failure of those in charge of the ship to observe some duty in the management of the ship which the law imposes upon them in respect to persons lawfully on the ship, it is not now necessary to discuss; for the case alleged in the libel in the present case charges that it was the negligent misuse of the ship's steam winch which caused the libelant's injury. It is, in effect, the same as if the charge was that a part of the ship itself, as a spar or a block, had, by fault of the ship's officers, fallen upon the libelant. It was therefore the ship itself which, through the negligent management of the officers, caused the damage, and this is within the test attempted to be set up in *Currie v. McKnight*. We think, therefore, that it is plain that the case stated in the libel in the present case entitled the libelant to proceed in rem under the maritime law as administered in our courts.

After ruling upon the point we have just discussed, the district judge considered the sufficiency of the allegations of the libel as to the negligence charged, and ruled that the libel was insufficient, in not charging that the incompetency was known, or could with reasonable care have been known, to the ship's officers. This objection, if relied upon by the respondent, should have been taken before answer, by an exception, so that, if held good, the libelant might, if so advised, have amended. But we are of the opinion that the allegations of the libel are sufficient. The libel alleges the duty of the ship to operate the winch, and that it required an experienced and skillful man to operate it, so as to avoid injuring the stevedores who were in the hold receiving the cotton as it was lowered down; that the cotton which fell on the libelant was dropped upon him in the hold by the negligent operation of the winch; that the master of the ship had taken away an experienced person who had before been operating it, and had substituted an ordinary laborer, entirely inexperienced in handling a winch driven by steam; and that, by reason of the neglect by the master of the ship of the duty to employ a competent winchman, the libelant was injured. It is contended for the appellee that the mere employment of an incompetent winchman would not make the ship liable, unless it was further alleged and proved that the incompetency was known to the master, or might have been known to him. The admiralty courts discourage prolixity and technicalities in pleading. The libel should state the facts necessary to give the court jurisdiction. It should not contain conclusions of law, but a statement of facts, in the form prescribed by admiralty rule 23, expressed with brevity, clearness, and certainty. 1 *Conk. Adm.* (2d Ed.) 72. The gravamen of this libel is the neglect of duty by the officers of the ship, in not providing a competent winchman. The allegation is that the regular winchman was sent to other duties by the master, and that

in his place he put an ordinary laborer, without experience or skill. It is true that the libelant must sustain the burden of showing that, with reasonable care, the master could have ascertained his incompetency, but that will be a deduction to be drawn from the facts proved.

It seems to have been supposed, and has been urged, that this was a case for the application of the doctrine of fellow servant; but the libelant's case, as stated in his libel, is not affected by that doctrine. Granting that the winchman was a fellow servant with the libelant, still the libelant has a cause of action, if the master of the ship placed, as his fellow servant in charge of steam machinery requiring skill to operate it, a man without skill, if it be shown that the master did not take reasonable precautions to ascertain that the man possessed the requisite skill. If it was a duty really requiring skill and experience, the master could not, without liability, pick up any ordinary laborer, and, without inquiring, put him in charge of the winch, to the injury of his fellow employes. In the case of fellow servants, it is said that the master does not warrant the competency of any of his servants, but that it is his duty to select them with discretion, having regard to their duties, and to exercise ordinary care and prudence in ascertaining their fitness for their employment. In order to recover, the libelant must prove, not only that the winchman was incompetent, but that the master failed to exercise proper care and diligence in ascertaining his qualifications, or failed to remove him after his incompetency had come to the knowledge of some officer of the ship. *Railway Co. v. McDaniels*, 107 U. S. 454, 458, 2 Sup. Ct. 932. This is the burden of proof which rests upon the libelant, but it would seem that the allegation that the master ordered the experienced man who was at the winch to do other work, and put in his place an ordinary laborer, not connected with the ship, and without experience in operating a winch, sufficiently raised the issue, in a case in which the libel was not excepted to, and in which it was met by the answer that the winchman was a competent man, of several years' experience in operating winches. The decree appealed from is reversed.

MEMPHIS & C. PACKET CO. v. OVERMAN CARRIAGE CO. et al.

(Circuit Court, S. D. Ohio, W. D. March 9, 1899.)

No. 1,754.

1. SHIPPING—COLLISION OF STEAMER WITH BRIDGE PIER—UNSEAWORTHINESS.
A court cannot find that the sinking of a steamer by collision with the pier of a bridge was due to unseaworthiness, merely from doubtful inferences, where there is direct and positive evidence of other facts which would alone account for the disaster.
2. SAME—NEGLIGENCE OF OFFICERS IN NAVIGATION OF VESSEL.
The *Longfellow*, a large river steamer, was starting on a trip from Cincinnati to New Orleans, carrying passengers and a valuable cargo. She had pilots on board, and was assisted by a tug. While the smokestacks were lowered to permit her passage under the suspension bridge at Cincinnati, as was frequently the case, the pilot house became so filled with